1968

State of Utah, by and Through Its Road Commission v. Joseph Delbert Marriott and Helen H. Marriott, His Wife, et al. : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,

Plaintiff and Respondent,

vs.

JOSEPH DELBERT MARRIOTT and HELEN H. MARRIOTT, his wife; M. STEWART MARRIOTT and LAURA MARRIOTT, his wife; CALEB MARRIOTT, a single man; GILBERT ENOS MARRIOTT and HELEN A. F. MARRIOTT, his wife; and ETHEL TRACY, a woman,

Defendants and Appellants.

Case No. 11088

BRIEF OF APPELLANTS

Appeal from Judgment and Order
Second District Court, Weber County
Honorable John F. Wahlquist, Presiding

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NATURE OF THE CASE

This is a highway condemnation action brought by plaintiff to acquire lands of the defendants in Ogden City, Weber County, for the Interstate Freeway Proj-

ect, wherein the sole issue before the lower court related to determining the value of an .83 acre tract of land being acquired for highway purposes.

DISPOSITION IN LOWER COURT

The value issue was tried by a jury, and a verdict was returned setting the value of the land acquired at $7,500.00, which was the exact amount testified to by the plaintiff's expert witness as being its value.

Defendants filed a Motion For New Trial (R. 46), based upon several errors which they contended were committed by the Court and opposing counsel. The Motion For New Trial was denied.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the Judgment on Verdict entered in this matter and of the Order denying their motion for a new trial, and request that the matter be returned to the Second Judicial District Court in and for Weber County for a new trial on the sole issue of damages to be awarded for the tract of unimproved land taken in these proceedings.

STATEMENT OF FACTS

On December 21, 1965, plaintiff filed a Complaint against defendants to acquire from them a triangular shaped tract of unimproved land on the west boundary

of Ogden City, at the intersection of Pennsylvania Avenue and 26th Street (Tr. 38, 52), for purposes incidental to construction of Interstate Freeway I-15, which ran northwesterly through the general area (Tr. 43). The freeway construction contemplated a built-up earthen fill of 25 feet as it crossed over Pennsylvania Avenue and the contiguous railroad spur track.

The tract of land involved consisted of .83 net acre (Tr. 46-67—and see the large Trial Map: Exh. A). The land was bordered on its south side by 26th Street and along the northerly side by Pennsylvania Avenue (which was in a northeasterly-southwesterly angle to the property). The west tip of the subject tract was in a five-point highway intersection area where five converging roads came together (Tr. 52, 67).

The property was zoned M-2 at the time (Tr. 48, 69), and was served by all necessary utilities, including sewer (Tr. 110).

Each litigant produced one expert witness for the purpose of establishing value. The witness for defendants, Harold Welch, testified that the highest and best use of the subject property at the time of taking was for a commercial service station site furnishing gas and other services to motorists (Tr. 48, 57), and valued the land at $35,000.00; plaintiff's witness, Gregory Austin, testified that the highest and best use of the property was that adaptable to a light industrial site (Tr. 113), and valued it at $7,500.00.

The jury verdict awarded defendants $7,500.00 for the property.

Defendants contend that, because of errors and abuse of discretion committed by the trial judge, together with improper argument made by opposing counsel in his summation to the jury, they were denied a fair and impartial trial as guaranteed them under the laws and Constitution of Utah and the United States. Because defendants contend that the prejudicial actions denying them a fair trial commenced with the empanelling of the jury, and continued to the moment the jury retired to deliberate, further facts will be stated in the chronology of points contained in the following argument.

ARGUMENT

I.

A JUROR'S PERSONAL FEELINGS CONCERNING THE LAW OR WHAT IT SHOULD BE IS NOT A PROPER SUBJECT OF INQUIRY ON VOIR DIRE EXAMINATION.

At the commencement of trial, after the Clerk had drawn the names of the 14 jurors to be examined, the trial judge generally informed the jury as to the nature of the case, that the Constitution and laws of Utah provide that a landowner should be paid compensation if his lands are taken for public projects, and that the law of eminent domain allowed the government to take

properties from a landowner without his consent for highway purposes because, otherwise, one might find " . . . somebody in the middle of a highway that wanted a million dollars . . . " (Tr. 18). The Court further went on to point out that for the lands actually taken a landowner should be paid fair market value, that the state legislature " . . . expanded on it just a little . . . to provide for severance damages . . . ," and that, if the public project benefitted the remaining lands of the owner, offsetting benefits should be deducted from severance damages since " . . . they don't want to give away the public money that way, . . ." (Tr. 19).

After generally stating the law, the trial judge then asked each prospective juror to stand up and state his thinking as to " . . . how you happen to feel about this law" (Tr. 19). Each juror was also asked " . . . if you had been a legislator (whether) you might have been more generous or less generous about it."

The general comments as to what the law was, as explained by the trial judge, may not have had a prejudicial effect upon the jurors if the matter had simply been dropped without getting into a discussion with the various jurors. However, it soon became evident that the case was starting off with a very subtle advantage in favor of the State Road Commission, as comments from the prospective jurors started coming forth:

> " . . . As a taxpayer I don't think any excessive payments or grants should be made to the property owner. Taxes are high enough now." (Tr. 20)

"I think it is a very good law. It would be pretty hard to have growth without it."

"I think we all have to give way to progress and sometimes the individual who is giving away to progress doesn't always benefit as he feels he should, but we have to regulate all of those things by law." (Tr. 22)

The thinking of the remaining prospective jurors generally fell in line with the comments made by the first two or three, and eventually the interrogation turned to other subjects.

Defendants submit that the explanation given to the prospective jurors, both before interrogating them and as they were being interrogated, is a more proper subject to be included in Instructions at the end of the trial, and should not be the subject of extensive interrogation during their selection. In addition to setting the stage for a trial favorable to the condemnor, there is another objection that does not readily appear. For instance, if any juror on the panel had feelings different from what the law was, it is very obvious that those feelings would almost have to be in the direction of being more favorable to the property owner losing his land. Accordingly, while in many cases the interrogation of the type conducted by the Court in this instance might not be harmful, the only conclusion which can be drawn from an interrogation of this type is that it serves no purpose beneficial to a property owner, that it places the condemning agency in a favorable light and, at the same time, serves as an effective tool

for "smoking out" any juror who might have feelings favorable to the property owner. Thus, the procedure here followed simply the purposes of the plaintiff.

In the case of *State v. Dodge,* 12 Utah 2d 293, 365 P. 2d 798 (1961), the Utah Supreme Court had before it on appeal a case which posed a similar question and which was appealed from the same source as the case at bar. In that case the trial judge gave quizzes to prospective jurors to determine their qualifications to become members of a jury panel. In commenting upon such method of selecting jurors this Court said on page 799:

> "There is no statutory provision for the giving of tests by a court to qualify persons called for jury duty. The court erred in restricting the jury panel to those who it thus determined were qualified. The procurement of a panel by this method could tend to deny a party a fair cross section of citizens of the county in which the trial is being held . . . "

This Court in that case went on to mitigate its stand against such quizzes by stating that the questions might have been intended to determine the qualification of prospective jurors under Sections 78-46-8 and 78-46-9, U. C. A., 1953.

In the instant case there can be no doubt that the trial judge's searching questions did not go to the fitness or competency of prospective jurors. The questions had no relationship to statutory qualifications. Instead, the questions went to the matter of general bias towards

the law of the State of Utah. Specifically, the questions were directed to ferret out only those persons against whom the state as condemnor would most likely use its peremptory challenges.

This type of conduct, where a trial judge has contributed to the selection of jurors by ferreting out those other than prospective jurors lacking statutory qualifications, has been condemned by this Court in the case of *State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. 2d 612 (1933). In that case this Court held it to be an abuse of discretion for a judge to challenge for cause (bias) on his own motion. Affirmatively stated, a judge can only dismiss a juror on his own motion when the juror lacks the statutory qualifications. If a judge cannot ferret out for cause challenges then, *a fortiori,* he should not be allowed to search out peremptory challenges.

Undoubtedly, the trial judge has considerable latitude in ascertaining the fitness and competency of jurors to sit in a cause. As much is clear from Rule 47 (a) of the Utah Rules of Civil Procedure, and from the case of *State v. Gregorious,* 81 Utah 33, 16 P. 2d 893 (1933).

Nevertheless, the *Gregorious* case contains a caveat against questioning by the judge as to the views of the prospective jurors. On page 894 this Court made clear the fact that a difference exists betwen admonishing jurors on points of law and between ascertaining state of mind concerning the law.

" . . . Further, we do not see anything objectionable to the questions propounded unless it be the last two questions, because they were more in the nature of admonitions to the jurors *than of ascertaining state of mind.*" (emphasis added).

The law has been more specifically stated in the New Mexico criminal case of *State v. Thompson,* 68 N.M. 219, 360 P. 2d 637, 639 (1961), where the Supreme Court of that state upheld a trial judge in refusing to permit appellant to interrogate prospective jurors on voir dire as to their attitude and frame of mind as to the law:

> "A juror's personal view as to the law or what it should be is not a proper subject of inquiry on voir dire examination; he is bound by the law received from the court." (citing authority)

Consequently, the trial judge in this case committed prejudicial error by interrogating prospective jurors as to their feelings and attitude toward the law of condemnation as applied in the State of Utah. Such is apparent by a comparison of the quoted portions of the *Gregorious* and *Thompson* cases with the language of the district judge where he asked (Tr. 18):

> "Third, I would like you to tell me generally, how you feel about this particular law of condemnation."

If this Court believes that the method followed by the trial judge in this case is proper, then it might ponder the interrogation of the prospective jurors by

the trial judge, or counsel, as to their feelings concerning the following question:

> "Members of the jury, the law of eminent domain does not permit a landowner in a condemnation case to recover for the following expenses which he must necessarily incur:
>
> (1) Attorney's fees;
>
> (2) Appraiser's fees, except to the extent of recovering $6.00 per day while the appraiser appears in Court (plus 20c per mile one way from the appraiser's residence to the place of trial; and
>
> (3) Business and similar losses not directly related to the value associated with his real property holdings.
>
> I want each of you to express your thoughts as to whether you believe the landowner should or should not be entitled to recover any or all of the foregoing expenses in an action of this kind."

In a subsequent condemnation case, where the same procedure of interrogating the jurors had been followed as was done in this case, the trial judge in this case refused to interrogate the prospective jurors concerning their thinking as to the foregoing matters, and would not permit counsel for the landowners to do so. It is submitted that no real distinction can be drawn which, once the door is opened, does not give both sides a fair exposure to a prospective juror's inner thinking.

II.

PERMITTING THE JURY TO VIEW THE PREMISES, WHICH HAD BEEN SUBSTANTIALLY OBLITERATED AND ALTERED, WAS AN ABUSE OF DISCRETION WHICH WAS PREJUDICIAL TO THE APPELLANTS' RIGHT TO A FAIR TRIAL.

During the trial plaintiff requested that the jury be permitted to view the premises. Defendants registered immediate objection to the request (Tr. 190) inasmuch as the entire area involved was greatly altered in appearance by reason of the large mounds of earth placed in the involved area and, worse still — since defendants' premise supporting their value claim was that the subject property being condemned had value as a service station site—every indication of the five-pointed street intersection on which the property originally faced was completely obliterated and destroyed.

Rule 47 (j) of the Utah Rules of Civil Procedure gives the trial judge discretion as to whether a jury view of the property which is the subject of litigation or of the place in which any material fact occurred should be permitted. No special rule or statute applies to the field of eminent domain as in some states—the one cited Rules applies in all civil cases.

In exercising this discretion the trial court should look to the utility in serving the judicial purpose as this Court did in the case of *Stevens v. Memmott,* 9 Utah 2d 37, 337 P. 2d 418 (1959). In the *Stevens* case this

Court was concerned with the ascertainment of clarity and with the effect of the jury view upon that quest. On page 420 this Court briefly stated the general guidelines to be followed by the lower courts:

> "We feel also that the court did not err in refusing to permit the jury to take a view of the disputed claims, since the evidence indicated that such a view would have led as much or more to confusion as it would to clarity."

Furthermore, this Court has indicated generally what facts give rise to the confusion mentioned in the *Stevens* case. In *Balle v. Smith,* 81 Utah 179, 17 P. 2d 224 (1932), the discretion of the trial judge, in refusing to permit a view of a model T Ford coupe loaded with five persons to resemble circumstances which existed at the time of the accident, was upheld on the ground that time had wrought changes which would confuse the jurors. This Court emphasized that about fifteen months had elapsed between the time of the accident and the day of the trial, during which time the boys and girls had increased in weight and size.

The rule as it applies to eminent domain cases is well stated by Judge Inch in the case of *United States v. 4,475.23 Acres of Land, More or Less, in Towns of Riverhead and Brookhaven, County of Suffolk, State of New York,* 151 F. Supp, 590, 591 (D. C. N. Y. 1957), *Affirmed,* 254 F. 2d 686 (2nd Cir. 1958):

> "While a view of the property by the Court, jury or commission is not now required, it is considered advisable, where possible, and when

the physical characteristics of the land and improvements have not so changed since the taking as to impair the value of personal inspection . . ."

The precise issue involved in this case arose in the case of *Ajootian v. Director of Public Works*, 90 R.I. 96, 155 A. 2d 244 (1959). That case involved the taking of a 2½ story wooden frame dwelling for freeway purposes. On appeal the landowner had alleged error in allowing a view of the premises. Directing its attention to the proper procedure which a trial judge should use in exercising his discretion regarding a view of the premises, the Rhode Island Supreme Court quoted on page 246 from its prior opinion in the case of *State v. Smith*, 70 R. I. 500, 41 A. 2d 153, 157:

> "But when an objection on grounds other than those purely legal is made to a motion that a view be taken, the trial justice should not pass upon the motion *pro forma.* He should require sufficient information respecting its merits so that he may intelligently exercise his discretion in deciding whether it was reasonably necessary for the better understanding of the evidence for the expedition of the trial and in protecting the rights of all interested parties. The burden of satisfying him that the taking of the view at such time is reasonably necessary under all the circumstances is upon the moving party in this instance, the state."

The Rhode Island Supreme Court continued by holding in regard to the sole issue upon appeal that the trial judge had abused his discretion in allowing a view of the condemned premises. In the words of that court

" . . . (t)he effect of the view . . . allowed the jury to see the property long after it was taken by the State and after the condition of the premises had materially changed for the worse." In conclusion the court spoke thusly, on page 247:

> "We are of the opinion that the customary purpose for which a view is ordinarily allowed was not shown in this case. In the circumstances previously outlined, the trial justice's action was clearly an abuse of discretion which was prejudicial to the petitioners' right to a fair hearing . . . . "

The *Ajootian* case is not the only case to be found which has faced the issue at hand. Other reported cases are to be found which point out the importance of the facts and the law involved in each appeal.

By way of example, in the case of *Oregon-Washington R. & Nav. Co. v. Campbell,* 34 Idaho 601, 202 Pac. 1065 (1921), an objection was raised to the view on the grounds of material alteration because of the construction of the railroad prior to trial. The appellate court held that there had been no abuse of discretion. A look at the facts points out that no alteration of the premises existed to the degree that it would confuse the jurors or create an injustice by precluding the jurors from visualizing the property as it existed at the time of the taking. The facts show that the railroad merely condemned a right-of-way through a large tract of 120 acres.

In contradistinction to the case last cited, the case

at bar poses a situation where major alterations had occurred prior to trial. The original tract contained 0.83 acre which was not subjected to a public easement (Tr. 39), and from that acreage there was actually used in construction 0.59 acre (Tr. 41). At the time of trial, construction activities on the taken property had been in progress for nearly two years (Tr. 39), and a six foot chain link fence which divided the taking from the remainder had been erected (Tr. 42). Approximately 25 feet of fill had been placed adjacent to the property (Tr. 43) and one of the two streets abutting the subject premises, 26th Street, had been ended or made into a cul-de-sac at a point east of the subject property and at a point which denied the subject property any access to 26th Street.

The alterations above mentioned are of particular significance when it is considered that the highest and best use of the subject property, as testified to by the landowner's expert witness (Tr. 66), was for a service station or other type of automotive service site. As admitted by the state's appraiser (Tr. 139), accessibility and view are important characteristics in selecting a service station site. Both of these characteristics had been severely impaired by construction activities. Of particular importance is the change in appearance created by the obliteration of 26th Street at its confluence with Pennsylvania Avenue, at which confluence or intersection the subject property was located.

The state of the statutory law concerning jury views is also reflected in the written case law. The

statutes or rules of many states give an absolute right to a jury view. This absolute right is claimed by a mere request for a jury view by one party. These statutes are particularly likely to be found as special legislation dealing with eminent domain. Cases where a jury view has been required by statute under circumstances where the appellant claimed a change in the conditions of the premises include the cases of *South Park Com'rs v. Livingston,* 344 Ill. 368, 176 N.E. 546 (1931), and *City of Akron v. Alexander,* 5 Ohio St. 2d 75, 214 N.E. 2d 89 (1966). It is interesting to note what the Ohio Supreme Court said about the jury view in eminent domain cases even though the interpretation of a *mandatory* statue was involved. In upholding the trial judge who had refused to allow a jury view the court said on page 91:

> "The purpose of the statute, in light of the previously stated rules of law, is to provide for just compensation to a property owner and to provide the jury with assistance when the evidence is complex or unclear. In a case where the view would cause an injustice to the property owner and deprive him of compensation to which he is entitled, and where the evidence of valuation is not alleged to be complex or unclear, the legislative purpose would not be served in granting a view of the premises."

Another Illinois case, but one which was not concerned with a *mandatory* statute, is the case of *City of Chicago v. Koff,* 341 Ill. 520, 173 N.E. 666 (1930). That case is directly in point and represents a decision

where the trial judge was overruled for abuse of discretion in allowing a jury view of condemned premises which had materially deteriorated. The taking involved the west seventeen feet of a tract with a four story brick building. The taking was sufficient to destroy the existing structure, making the lot suitable for only a small building. In the interim between the taking and trial the building had been vacated and had deteriorated through nonuse and possibly vandalism. In determining whether the trial court had abused its discretion the Illinois Supreme Court discussed the danger in allowing a jury view of condemned properties which had physically changed. The reasoning behind the court's decision to reverse the trial court is given on page 668:

> "It was a matter within the discretion of the trial court to permit or deny a view of the premises, subject to review for abuse of that discretion. Was it an abuse of discretion to permit the jury to view the premises in this case?
> * * *
>
> "Much valid objection may be seen to a view by the jury in a case of this character. There is no method by which there may be preserved in a bill of exceptions the evidence of the manner in or extent to which the minds of the various members of the jury were impressed by a view of a building, and where, as here, such changes have taken place as to render a view of no assistance to the jury, for the reason that the condition at the time of the trial does not reflect the value as of the time the petition was filed, it is an abuse of discretion to permit such view. It will be conceded that a photograph which does not

present a true picture of an object as of the time to which the evidence concerning it relies is not admissible in evidence except it be with a full explanation of the changes, and we are of the opinion that in this case the building showed such deterioration that a view of the premises should not have been permitted. Such view could scarcely have been said to be of any assistance to the jury in understanding the evidence offered concerning the property."

The reasoning of the *Koff* case is echoed in the case of *City of Cleveland v. Carcione,* 118 Ohio App. 525, 190 N.E. 2d 52, 5 A. L. R. 2d 52 (1963), where the trial court was declared to have abused its discretion in allowing a jury view of condemned property which had deteriorated subsequent to the resolution of taking. The appellate court reasoned that no useful purpose was served in permitting the jury view and that in the state of the record to do so was prejudicial to the substantial rights of the appellant. ,

III

PREJUDICIAL ERROR WAS COMMITTED IN PERMITTING AN UNQUALIFIED WITNESS TO GIVE EXPERT OPINION TESTIMONY.

As part of plaintiff's case it offered George M. Jay as an expert witness for the purpose of giving testimony concerning the subject property as not being a good service station site (Tr. 95). His qualifications consisted of being the area sales representative for

Standard Oil Company of California (Tr. 91), primarily involved in selling merchandise to the various Chevron stations. Over objections of defendants' counsel, Mr. Jay was permitted to testify that, in his personal opinion, the subject property " . . . would (not) make a good service station site." (Tr. 95)

There is no doubt that the law in Utah leaves the matter within the sound discretion of the trial court, as stated in the condemnation case of *Weber Basin Water District v. Nelson,* 358 P. 2d 81, 11 Utah 2d 253 (1960), where this Court said:

> "The matter of proper foundation or qualification of a witness to state an opinion, where the same is permissible in evidence, lies largely within the sound discretion of the trial court. The determination of the trial court will not be disturbed except in extreme cases where it is manifest that the trial court abused its discretion."

In making their objections to Mr. Jay's testimony, defendants objected to the foundation and background of the witness on two separate points:

(1) *The witness was unfamiliar with the subject property.*

> A. Now in your opinion, what kind of service station site would this subject property that is showed in pink?
>
> MR. FULLER:
>
> We object. There is absolutely no foundation to show the familiarity of this witness to this site.

THE COURT:

Do you know where we are talking about?

A. I think it is a little piece that is fenced off, is it not, your honor? I am not familiar with the footage.

Q. Are you familiar with the intersection of 26th and Pennsylvania Avenue prior to the construction of the freeway in that area?

A. Yes, but I never paid much attention to it, to tell you the truth. (Tr. 94)

(2) *The witness had insufficient qualification to serve as foundation for the giving of an opinion concerning the subject property as a service station site.*

Q. Now, what type of traffic would you say is on Pennsylvania Avenue?

A. I would say the majority of your travel on Pennsylvania Avenue is people going to and from the Marquardt Plant.

* * *

A. I think that, I have never made a study of it. I think that is where most of them are going.

MR. FULLER:

We move the testimony be stricken. With no study, it is simply a supposition, your Honor. (Tr. 93-94)

* * *

Q. Have you ever studied the State Highway Commission's statistics in that area?

A. I have not.

Q. Do you know, or have an opinion as to what volume of traffic flow is there?

MR. BROWN:

I object to this, your Honor.

THE COURT:

He may ask.

Q. Do you know, or do you have an opinion as to what volume of traffic flow would encourage an oil company to set up a station on this street if its location were proper?

A. I can't answer that because I don't have the information.

Q. I take it then that you do not know either in terms of volume or flow or actual destination what the real destination or source of traffic on Pennsylvania Avenue is?

A. That is right. (Tr. 99)

* * *

Q. Do you have an opinion, then, as to what type of service station, to what extent this could be developed as a service station site?

MR. FULLER:

We raise our objection, no foundation at all.

THE COURT:

Answer the question, whether you do or do not have an opinion as to whether or not that would be a desirable service station or not?

A. I will give my personal opinion. *I do not have the background as a proper development man to tell you that, to tell whether it would or not. I will give my personal opinion.* That's all I can give. (emphasis added).

MR. FULLER:
Now we would object to that.

A. That's all I can do.

Q. I think there is a foundation as much as Mr. Welch's foundation to give his personal opinion.

THE COURT:
Don't argue at this time .You can argue later. The Court will rule that this is legal evidence, you can give whatever value you see fit. Answer the question. (Tr. 95)

* * *

MR. FULLER:
And, I take it you are not too familiar with the prices that are paid for sites for service stations by your company?

A. No, I am not. (Tr. 96)

* * *

Q. Now, what type of a service station site would you have to have, do you think, in your opinion, to pay $35,000.00 for it?

MR. FULLER:
We object, the witness just isn't qualified.

THE COURT:
Answer the question if you can.

A. I can't answer that. I don't know what kind of property you have to have.

Q. Could you estimate?

A. It is not in my realm of knowledge of the service station business or where they develop the property. (Tr. 102)

It is respectfully submitted that to permit a witness to testify as to whether a given property is or is not a good service station site, over objections timely made, where a witness (1) was unfamiliar with the subject property and (2) by his own admissions was not qualified to give such an opinion, constituted an abuse of discretion under the circumstances.

IV.

THE REFERENCE MADE BY PLAINTIFF'S COUNSEL DURING CLOSING ARGUMENT TO THE JURORS AS TAXPAYERS WHO WOULD BEAR THE BURDEN OF THE VERDICT WAS AN APPEAL TO THE SELF-INTEREST OF THE JURORS CONSTITUTING PREJUDICIAL ERROR AND REQUIRING A NEW TRIAL.

During the course of his closing argument, counsel for the State Road Commission made reference to payment of the verdict from public funds and to the jurors as taxpayers. The exact words of counsel are found in the transcript (Tr. 182):

> "Now, everyone agrees that the Marriott family is entitled to receive just compensation for this property being acquired by the State Road Commission. On the other hand, it would be unjust to award a windfall at the expense of the public purse. You people are tax payers, all of us in this courtroom are tax payers."

Counsel for the defendant landowners, not wanting to call undue attention to the improper reference, made immediate objection by handing the judge a note which appears in the record with the defendants' proposed Instruction (R. 42). That note reads as follows:

> "Judge Wahlquist:
>
> We take exception to the argument relating to reference to the "public purse" and "you taxpayers must pay for this;" etc.
>
> "We believe it to be reversible error, unless a clear admonition is given to the jury on the matter."
>
> (Initialed) G.E.F.

The admonition sought by defendants' counsel was not given by the district judge. Neither at the conclusion of the plaintiff's closing argument (Tr. 187) nor at the conclusion of all argument (Tr. 190) were the jurors admonished to disregard their self-interest as taxpayers. The only subsequent reference to the jurors as taxpayers was made by defendants' counsel during his closing argument when he attempted to repair the damage done by plaintiff's counsel (Tr. 189).

After the jury had retired the district judge quoted for the record the written objection of counsel for the landowners (Tr. 190). Formal exception to the remarks of counsel for the State Road Commission were then made of record (Tr. 192).

The authorities are unanimously in agreement that appeals to sympathy, passion and prejudice should not be allowed. Appeals to class prejudices such as

appeals to the self interest of jurors as taxpayers are highly improper and are not to be condoned. Statements in argument that any verdict recovered against a governmental unit must be satisfied from tax funds and thus indirectly paid by the jurors and other taxpayers, have uniformly been regarded as highly improper appeals to the self-interest of the jurors. ***Eager v. Willis,*** 17 Utah 2d 314, 410 P. 2d 1003 (1966); *Sullivan v. County of Allegheny,* 187 Pa. Super. 370, 144 A. 2d 498 (1958); ***Mississippi State Highway Commission v. Hall,*** 252 Miss. 863, 174 So. 2d 488 (1965); 53 Am. Jur., ***Trial,*** Sec. 499; Annotation, 33 A. L. R. 2d 442 (1954).

This Court noted in the case of ***Eager v. Willis,*** *supra,* its agreement with the well-established rule that appeals to sympathy, passion and prejudice should not be condoned. On page 1007 of the regional reporter this Court said:

> " . . . We have no disagreement with the authorities cited to the effect that pleas plainly designed to elicit sympathy or to inspire passion or prejudice should not be allowed . . . "

The reasoning behind the rule as it applies to appeals to the self-interest of jurors as taxpayers is well-stated in ***Williams v. City of Anniston,*** 257 Ala. 191, 58 So. 2d 115 (1952). In that case the plaintiff sought to recover against a municipal corporation for damages alleged to have been suffered by her from a fall over a defect in a city sidewalk. The attorney

for the defendant municipal corporation made a statement to the jury which appears on page 116 and which reads in part:

> "If the plaintiff is given a verdict, where will the money come from? It will come out of the city treasury. The city has no money of its own. The only money which it has is money which it gets from taxes . . . "

In commenting upon the above-quoted statement the Supreme Court of Alabama said on page 116:

> "In effect counsel for the defendant told the members of the jury that if they gave the plaintiff a verdict, they were taking the money out of their own pockets. It was in effect the same as saying that it would be they themselves together with other taxpayers who would pay the plaintiff if she was given a verdict. We think it clearly appears that the argument of counsel was an appeal to the prejudices of the jurors . . . "

This same condemnatory language applies equally well to the facts here involved. Counsel for the State Road Commission informed the jurors that the money to pay their verdict must come from the "public purse". The jurors were then expressly, and more directly than in the *Williams* case, reminded that they were all taxpayers.

This prohibition against argument designed to elicit sympathy and inspire prejudice is applicable to both sides in eminent domain cases; the prohibition acts as a two-edged sword. Such is obvious from the

case of *Mississippi Highway Commission v. Deavours,* 251 Miss. 552, 170 So. 2d 639 (1965), where a reversal was obtained on the grounds that testimony was admitted, over objection, as to the federal government's participtaion in road projects for which land was condemned and as to the appraiser for the highway commission being a treaspasser for having failed to secure permission before entering upon the land to be condemned.

This Court has previously held that argument which tends to incite sympathy or arouse prejudice by inviting the jury to resolve any doubt it might have in favor of one party constitutes a ground for reversal. In the case of *Anderson v. Santa Fe Trail Transp. Co.,* 107 Utah 20, 151 P. 2d 465 (1944), such error was considered as ground for revarsal. In the concurring opinion of *three* justices, the argument by counsel to the jury to the effect that the bus company was a foreign corporation, that it would pay any judgment rendered, and that its property within the state could be levied upon in satisfaction of the judgment was irrelevant, improper and constituted a ground for reversal.

Likewise, the Court in the case of *Williams v. City of Anniston, supra,* thought the argument of counsel, making reference to the jurors as taxpayers who would bear the burden of their own verdict, was of such a prejudicial nature as to constitute a ground for reversal. The prejudicial statement of counsel in that case has previously been quoted and compared to the words

of counsel here questioned. In giving its sole ground for reversal the Alabama Supreme Court held on page 116:

> "We have carefully considered the argument which counsel for the defendant was allowed to make in the defendant's behalf to the jury. These statements are obviously an appeal to the self-interest of the jurors as taxpayers and are of such a prejudicial nature as to constitute a ground for reversal. (citing authority)."

In the case of *West v. State,* 150 S. W. 2d 363, 366 (Tex. Civ. App. 1941), the court thought the argument of counsel to be so highly prejudicial that a reversal would be required, even in the absence of objection. That case involved the laws of eminent domain and four improper statements from counsel. The first two were made in opening argument with no objection, and the last two were made in closing argument when objection had been overruled. No admonition or specific instruction was given by the judge to the jury.

> "Counsel's argument to the jury (1) "You are the taxpayers"; (2) "The taxpayers will have to pay the bill"; (3) "You as taxpayers are directly interested in this suit"; (4) "When you go above $25 per acre you will be taking the money out of your own pockets" are plainly direct appeals to the self-interest and prejudice of the jurors. Such arguments have many times been held to constitute reversible error . . . "

In *Doty v. Jacksonville,* 106 Fla. 1, 142 So. 599, 601 (1932), a condemnation proceeding, counsel for the city in his argument was permitted, over objection,

" . . . to state to the jury that when they retired to consider their verdict they should keep in mind that whatever is paid to defendant as compensation for the property would come out of the pocket of the tax payers, and that the jury as tax payers would pay a part of whatever should be allowed to the defendant for his property."

Objection to this line of argument was made, and the objection overruled. This constituted reversible error. Counsel for the city made some subsequent effort to qualify and explain this argument, but the damage had been done, and we are clearly of the opinion that such argument was improper, and, in its tendency, prejudicial to the defendants' case. (citing authority)"

The last two cited cases have held respectively that prejudicial error resulted even in the absence of an objection and that subsequent qualifications and explanations by offending counsel were insufficient to eradicate the error. All cases have not followed such strict rules. In fact, most cases would appear to follow the rule that prejudicial error results from an unprovoked argument of counsel, directing the jurors' attention to the fact that any judgment recovered in the action will be paid from tax funds, when such argument is not effectively corrected at the trial. *Stewart v. Idaho Falls,* 61 Idaho 471, 103 P. 2d 697 (1940); *Huggins v. Hannibal,* 280 S. W. 74 (Mo. Ct. App. 1926); Annotation, 33 A. L. R. 2d 442 (1954).

In the instant case, counsel for the defendants made a timely and strenuous objection. Such objection

was made by the means counsel thought most appropriate to prevent the arousal of further prejudice in the jury by emphasizing and belaboring their status as taxpayers. Counsel's objection specifically asked the trial judge to admonish the jury on the matter in order to prevent reversible error. Still, the judge uttered not one word of admonition to the jury concerning their status as taxpayers and their interest in the lawsuit arising out of such status (Tr. 190).

In the words of the Court in the *Huggins* case at page 75,

> " . . . (t)he only proper remedy, if any, in such a situation is for the court, upon objection being made, "to promptly and effectively rebuke counsel so as to strongly impress the jury with the unfairnes of the procedure, and to deter them from giving the least weight to an argument so hostile to the pure administration of justice, (citing authority)".

The test to be applied in determining whether a fair and impartial trial was had or whether prejudice resulted from the argument of counsel has been stated in varying ways. In *Williams v. City of Anniston, supra,* the Alabama Supreme Court said on page 117:

> "The point is advanced that the argument should not be regarded as prejudicial because there was ample evidence to support the verdict by the jury regardless of the argument. The test, however, is not that the argument did unlawfully influence the verdict, but that it might have done so (citing authority)".

This Court has stated the test somewhat differently in the case of *Eager v. Willis*, 17 Utah 2d 314, 410 P. 2d 1003, 1005 (1966). In that case this Court saw no transgression of principles previously stated by counsel for defendant having asked the jurors to consider themselves in the situation of the plaintiff.

> "The question here involved is whether the case was presented to the jury in such a manner that it is reasonable to believe that the parties had an opportunity to present their evidence and have a fair and impartial trial by the Court and jury. If that result has been accomplished irregularities or minor errors should be disregarded. Reversal of a judgment is justified only when there is some error of such a substantial nature that there is a likelihood that the result would have been different in its absence."

It is respectfully submitted that there is a likelihood that the result would have been different in the absence of statements to which objection is here made. This is strongly pointed out by a comparison of the evidence with the jury verdict. Testimony in this case was highly conflicting. The State's appraiser gave a figure of $7,500.00 as the value of 0.83 acre of land (Tr. 123), while the landowners' appraiser testified to a value of $35,000.00 (Tr. 73). The jury verdict did not vary one cent from the figure testified to by the State's appraiser. In a case where the testimony was so highly conflicting, the jury verdict clearly shows the influence of prejudice.

V.

PREJUDICIAL AND ERRONEOUS STATEMENTS OF LAW CONTAINED IN THE JURY INSTRUCTIONS DEPRIVED DEFENDANT LANDOWNERS OF A FAIR AND IMPARTIAL TRIAL.

No jury instructions were given which effectively corrected the error committed by counsel in referring to the jurors as taxpayers with the burden of satisfying their own verdict. In fact, the jury instructions given by the trial judge compounded the error which was subsequently committed by counsel for the State Road Commission. The trial judge even stated for the record that the instructions gave emphasis to the law against sympathy and prejudice in favor of the landowners. Defendants took exception to several of the Instructions given by the Court to the jury, claiming generally that the instructions supported the position taken by counsel for plaintiff in his closing argument wherein he referred to the "public purse" and that the jurors are "taxpayers", and also objected to the instructions as being definitely slanted and adverse against the property owners due to repetition and emphasis contained therein (Tr. 191-193).

The Instructions to which exceptions were taken, insofar as material to this argument, are as follows:

"No. 8.

" . . . If, in your deliberation, you believe that the evidence introduced by both parties is evenly

balanced and the evidence of one party is no more believable than the evidence of the other, then *you will reject the contentions advanced by the defendant land owner.*" (emphasis added)

(R. 159)

"No. 9.

" . . . *Specifically,* if the defendant landowners fail to prove the truthfulness of the facts which they allege by a preponderance of the evidence, you will find against the defendant landowners in your deliberation of such fact." (emphasis added)

(R. 160)

"No. 15.

"You are instructed that feelings and expressions of sympathy and generosity toward the landowners have no place in the trial of this matter. Nor should such feelings or expressions be present in your deliberations or play any part therein, nor shall you assess any damages or compensation for any such feelings or expressions . . . "

(R. 166)

After exceptions were taken to the Instructions as given, the Court stated:

" . . . There is somewhat more emphasis than I realized in the instructions going against sympathy and prejudice and this type of thing, but I do not believe it will prejudice this jury. I will leave it stand."

(Tr. 193)

The trial judge was referring specifically to Instruction No. 15 (R. 43 & Tr. 166). That instruction admonishes the jury against "feelings and expressions of sympathy and generosity *toward the landowners*"

(emphasis added). There is no corresponding instruction making reference to feeling and expressions of sympathy and generosity *toward the State*. Such an instruction admonishing in regard to prejudice *against the landowner and for the State* was clearly necessary to balance the instructions, particularly in light of the unfortunate statements made by plaintiff's counsel during his closing argument. Furthermore, Instruction No. 15 is repetitive of the exact principle by again making reference to sympathy for the landowners, thus giving undue prominence to such admonition.

The giving of instructions which are unbalanced in favor of one party and which give undue prominence to legal principles favorable to either side is contrary to sound judicial practice and constitutes reversible error. This Court specifically held that unbalanced instructions which influenced the jury in bringing its verdict of no cause of action constituted reversible error. *Devine v. Cook,* 3 Utah 2d 134, 279 P. 2d 1073 (1955). Similarly, the Iowa Supreme Court has held as follows in *Evans v. Holsinger,* 242 Iowa 870, 48 N. W. 2d 250, 255 (1951):

> " . . . It is well established that undue prominence should not be given, in the court's instructions, to any matter favorable to either side; and that correct statements of the law if repeated to the point of such undue emphasis, may constitute reversible error."

In Instruction No. 8 (R. 43 & Tr. 159) and again in Instruction No. 9 (R. 43 & Tr. 160) the jury is

advised as to the burden of proof resting upon the defendant landowners. Such repetition of a burden of proof instruction to the point of undue emphasis has been held upon appeal to constitute reversible error. *Boruchi v. McLaughlin,* 344 Ill. App. 550, 101 N. E. 2d 624 (1951); *O'Gallagher v. Finkel,* 7 Ill. App. 2d 296, 129 N. E. 2d 345 (1955); *Evans v. Holsinger, supra.* This Court held in the case of *Shields v. Utah Light & Traction Co.,* 99 Utah 307, 105 P. 2d 347, 349, 351 (1940), that reversible error resulted from emphasis by reiteration.

> " . . . The reiteration of given propositions to the jury in the instructions does not have judicial approval. (citing authority)"
>
> * * *
>
> " . . . And the resulting emphasis on applicable laws favorable to plaintiff's side as a result of the continual reference and repeating of certain law propositons resulted in the unbalancing of the charge, and error."

Specific objection is here made to the last sentence of Instruction No. 8 and the last sentence of the first paragraph of Instruction No. 9. The first of these two sentences, from Instruction No. 8, is here reproduced:

> "If, in your deliberation, you believe that the evidence introduced by both parties is evenly balanced and the evidence of one party is no more believable than the evidence of the other, then you will *reject* the contentions advanced by the defendant landowner." (emphasis added)
>
> (R. 43 & Tr. 159)

This sentence and also the sentence to which reference has been made in Instruction No. 9, announce a proposition which cannot be supported by law. These sentences announce to the jury an "all or nothing" proposition which has no place in a condemnation case. These sentences directly advise the jurors to "reject (all) the contentions advanced by the defendant landowners" in the event the evidence is evenly balanced. This is simply a matter of instructing the jury to find in a sum equal to that testified to by the State Road Commission should the evidence be equally balanced. This is nothing short of a directed verdict in many condemnation cases such as the one at bar.

A similar instruction was assigned as error in the condemnation case of ***State of Idaho ex. rel. Rich v. Dunclick, Inc.,*** 77 Idaho 95, 286 P.2d 1112, 1117 (1955). Instruction No. 15 in that case reads as follows:

> "You are instructed that the burden of proof as to the value of the land taken and the damages which result to the property not taken is upon the defendants in this case. ***If in your opinion the defendants have not carried the burden of proof in establishing value and damages in this case your verdict shall not be in excess of the amount established by the State of Idaho as values and damages.***" (emphasis added)

In reviewing the case because of the error contained in Instruction No. 15, the Idaho Supreme Court said:

> "The instruction as given assumed a fact to exist which is not evidence, namely, that respond-

ent had established by some method or means the value of the land taken and amount of the damages to the remainder.

"It is the province of the jury to evaluate the pertinent testimony of all the witnesses and fix the value of the land taken and the damage to the remainder because of the severance from the whole. The instructions as given limited the amount of the recovery to an undetermined, assumed, established sum. The burden of proving the amount of damages sustained, i.e., the value of the land taken and resultant damage to the remainder, must be borne by appellants. Whether such burden has been sustained is a question for the jury to determine. *The second sentence of said instruction above quoted should not have been given.*" (emphasis added)

This Court has specifically held that errors and irregularities in jury instructions, such as those here presented, constitute reversible error. The personal injury case of *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 134, 279 P. 2d 1073, 1077 (1955), so holds:

"Even assuming that the instructions of the court taken in their entirety could be considered correct as given, the continual repetition of instructions on contributory negligence and the positive delineation of the duties of the plaintiffs, as contrasted with the qualified negative statements of the duties of the defendants, unbalanced the instructions in favor of the defendants and influenced the jury in bringing its verdict of no cause of action as against all three plaintiffs, and therefore constituted reversible error."

CONCLUSION

The foregoing discussion should amply justify a holding that these defendants did not have a fair and impartial trial; in short, that they did not have "their day in court". Applying the general rule that situations of this type should be measured by the standard of whether there was a reasonable possibility that the jury was influenced by the claimed prejudicial errors committed, it would be well to again refer to the statement of the trial judge (Tr. 193) when he stated:

> " . . . There is somewhat more emphasis than I realized in the instructions going against sympathy and prejudice and this type of thing, but I do not believe it will prejudice this jury."

Obviously, the trial judge did not expect the verdict to be returned on the basis of the lowest testimony given, since the remark can only be interpreted as a belief that the verdict would be higher. Stated conversely, the comment implies that the effect of prejudice would be present in a verdict exactly amounting to the lowest testimony furnished.

It is respectfully submitted that justice can only be served in this case by reversing and remanding the matter for a new trial.

Respectfully submitted,

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